NO. 85-1630

Supreme Court, U.S.
FILED
SEP 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

LOWELL D. HEWITT, Superintendent;
B.B. KYLER, C.O. III; R.E STOTELMYER,
Major; B.K. SMITH, Counselor III;
K.R. HILEMAN, Farm Manager;
D.R. ERHARD, Deputy Superintendent
for Treatment;
T.W. HENRY, Director of Treatment;
W. MATEER, C.I. Manager,
Petitioners

v.

AARON HELMS,
Respondent

On Writ of Certiorari to the United
States Court of Appeals for the
Third Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a civil rights plaintiff who received no personal benefit from his litigation, because his prayer for equitable and declaratory relief had been rendered moot and the defendants were immune from an award of damages, nevertheless is entitled to an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 14

ARGUMENT .....

A CIVIL RIGHTS PLAINTIFF WHO RECEIVES NO PERSONAL BENEFIT FROM HIS LITIGATION AND WHO SOUGHT NO RELIEF ON BEHALF OF A CLASS IS NOT A PREVAILING PARTY WITHIN THE MEANING OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT 18

TABLE OF CONTENTS
(Continued)

PAGE

A. The Attorney's Fees Awards Act Requires That The Plaintiff Or Those Whom He Represents Secure Some Relief In Order To Be Entitled To An Award Of Attorney's Fees 19

B. It Is Inconsistent With The Policies Underlying The Doctrine Of Good Faith Immunity To Permit Recovery Of Fees Where The Defense Of Immunity Is Upheld 39

CONCLUSION 47

TABLE OF AUTHORITIES

CASES	PAGES
Ashcroft v. Mattis, 431 U.S. 171 (1977).....	29, 30 32, 34
Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975)...	20
Bell v. Wolfish, 441 U.S. 520 (1979).....	34
Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972).....	21
Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978).....	45
City of Los Angeles v. Lyons, 461 U.S. 95 (1983).....	32, 33 34
City of Riverside v. Rivera, No. 85-224 (June 27, 1986).....	41
Ellis v. Dyson, 421 U.S. 426 (1975).....	27
Evers v. Dwyer, 358 U.S. 202 (1958).....	21
Golden v. Zwickler, 394 U.S. 103 (1969).....	26, 27 28

TABLE OF AUTHORITIES
(Continued)

CASES	PAGES
Green v. Mansour, No. 84-6270 (December 3, 1985).....	32, 33
Hanrahan v. Hampton, 446 U.S. 754 (1980).....	21, 22 23, 24 31, 35
Harlow v. Fitzgerald, 457 U.S. 800 (1982).....	39, 40
Helms v. Hewitt, 780 F.2d 367 (3d Cir. 1986).....	1, 4
Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981).....	6, 7, 12
Helms v. Hewitt, 712 F.2d 48 (3d Cir. 1983).....	7
Helms v. Hewitt, 745 F.2d 46 (3d Cir. 1984).....	9, 10
Hensley v. Eckerhart, 461 U.S. 424 (1983).....	21, 22 44, 46
Hewitt v. Helms, 455 U.S. 999 (1982).....	6
Hewitt v. Helms, 459 U.S. 460 (1983).....	7, 38
Hutto v. Finney, 437 U.S. 678 (1978).....	43

TABLE OF AUTHORITIES
(Continued)

CASES PAGES

Illinois v. Gates, 462 U.S. 213 (1983)..... 37

Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974)..... 21

Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983)..... 24

Kentucky v. Graham, No. 84-849 (June 28, 1985)..... 45

Kopet v. Esquire Realty Co., 523 F.2d 1005 (2d Cir. 1975)..... 20

Knies v. Richardson, Civ. No. 84-C-822 (E.D. Wis., January 14, 1985)..... 41

Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971)..... 21

Maher v. Gagne, 448 U.S. 122 (1980)..... 20

Marek v. Chesny, No. 83-1437 (June 27, 1985)..... 46

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978)..... 22

TABLE OF AUTHORITIES
(Continued)

CASES	PAGES
Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970).....	20
Parker v. Matthews, 411 F.Supp. 1059 (D.D.C. 1976).....	21
People of Three Mile Island v. NRC, 747 F.2d 139 (3d Cir. 1984).....	41
Perez v. Ledesma, 401 U.S. 82 (1971).....	28
Pierson v. Ray, 386 U.S. 547 (1967).....	42
Public Service Commission of Utah v. Wycoff Co., Inc. 344 U.S. 237 (1952).....	35
Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D.Ore. 1969).....	20
Roe v. Wade, 410 U.S. 113 (1973).....	26
Scheur v. Rhodes, 416 U.S. 323 (1974).....	42, 43
Steffel v. Thompson, 415 U.S. 452 (1974).....	27
Stevens v. Gay, 792 F.2d 1000 (11th Cir. 1986).....	31

TABLE OF AUTHORITIES
(Continued)

CASES

	PAGES
Superintendent, Massachusetts Correctional Institution v. Hill, No. 84-438 (June 17, 1985)	37
Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970)	20
United Public Workers of America v. Mitchell, 330 U.S. 75 (1947)	26
Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982)	26
Wood v. Strickland, 420 U.S. 308 (1975)	42

STATUTES

Civil Rights Act of 1871, 42 U.S.C. § 1983	4, 18
Civil Rights Attorneys Fees Awards Act of 1976, Pub. L. 94-559, October 19, 1976, 90 Stat. 2641, 42 U.S.C. § 1988	passim
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2201	27

TABLE OF AUTHORITIES
(Continued)

PAGES

MISCELLANEOUS

1976 U.S. Code Cong. & Ad. News 5909-10..... 19

Moore Federal Practice, 57-24 (3d Ed. 1986)..... 27

Borchard, Declaratory Judgments (2d ed. 1941)..... 27

S. Rep. 94-1011 (1976)..... 20, 36
H. Rep. 94-1558 (1976)..... 21, 36

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 780 F.2d 367 (3d Cir. 1986) and may be found in the appendix to the petition for writ of certiorari. (Pet. App. 3a-25a) The opinion of the district court of March 14, 1985 (Pet. App. 26a-39a) is not reported.

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was issued on January 3, 1986. The petition for a writ of certiorari was filed within ninety days of that date and was granted on June 16, 1986. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. 94-559, October 19, 1976, 90 Stat. 2641, as amended, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988.

STATEMENT OF THE CASE

Petitioners, current or retired officials of the Pennsylvania Department of Corrections, sought a writ of certiorari for this Court to review the decision of the Court of Appeals for the Third Circuit holding that respondent, Aaron Helms, was a prevailing party within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Helms v. Hewitt, 780 F.2d 367 (3d Cir. 1986). The Court granted the writ of certiorari on June 16, 1986.

This action began in the United States District Court for the Middle District of Pennsylvania on July 26, 1979. Helms filed it pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, on his own behalf and his behalf alone. At that time, Helms was incarcerated in a state prison. J. App. 7a.

In his complaint, Helms challenged his detention in administrative segregation status at the prison pending completion of an investigation into allegations of misconduct, challenged the finding of guilt on the misconduct charges, and challenged his subsequent confinement to restricted custody. He sought declaratory and injunctive relief, together with damages, costs, attorney's fees and "[s]uch other relief as may be necessary and proper." J. App. 7a-21a.

On February 20, 1980, Helms was paroled from prison. On August 15, 1980, the District Court, considering cross-motions for summary judgment, entered judgment against Helms and in favor of the corrections officials. In so doing, the District Court held that Helms' confinement in administrative segregation

implicated no interest protected by the Fourteenth Amendment (administrative custody issue). In addition, the court held that the prison hearing committee's reliance upon information obtained from a confidential prison informant to find Helms guilty of misconduct was proper (informant testimony issue).

The Court of Appeals reversed the judgment of the District Court on both issues. Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981). The corrections officials then filed a petition for writ of certiorari in this Court seeking review on the administrative custody issue only. The petition was granted. Hewitt v. Helms, 455 U.S. 999 (1982).

This Court agreed with the Court of Appeals' decision that the prison system's regulations governing a prisoner's transfer to administrative

segregation created a liberty interest protectible by due process, but reversed the Court of Appeals' judgment, finding that Helms had received all the process that was due to protect that interest. Hewitt v. Helms, 459 U.S. 460 (1983). On remand, the Court of Appeals vacated its previous judgment on the administrative custody issue and directed the District Court to conduct further proceedings consistent with its original opinion on the informant testimony issue. Helms v. Hewitt, 712 F.2d 48 (3d Cir. 1983).[1]

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[1]The original direction to the district court was as follows: "Thus, on remand, if the defendants do not establish official immunity as discussed in Part IV infra, the district court should enter summary judgment for Helms on the issue whether he was denied due process in being confined in disciplinary custody." Helms, 655 F.2d at 502-03.

On remand to the District Court, the parties filed cross-motions for summary judgment on the informant testimony issue. The only question presented in the cross-motions was whether the prison officials were entitled to immunity from damages. J. App. 28a., Pet. App. 28a. Helms did not pursue requests for either declaratory or injunctive relief. The District Court entered judgment in favor of the officials and against Helms. J. App. 48a. Helms again appealed, claiming that the District Court had erred in determining that the officials were entitled to immunity and in failing to order them to expunge the prison misconduct charges based on the information

supplied by a confidential informant.[2] The Court of Appeals affirmed the District Court's judgment without opinion. Helms v. Hewitt, 745 F.2d 46 (3d Cir. 1984). In all appeals to the Court of Appeals, the prison officials argued that the declaratory and injunctive relief requested in the complaint had been rendered moot by Helms' release from prison in 1980.

After the District Court had entered judgment but before that judgment was affirmed on appeal, the Pennsylvania Bureau of Corrections issued an amended regulation known as "Administrative Directive 801: Inmate Disciplinary Procedures." J. App. 85a.

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[2]By virtue of his failure to pursue any claim for equitable relief in the District Court, the corrections officials argued on appeal that Helms had waived this claim.

Effective May 1, 1984, the amended directive established, for the first time, procedures for the use of confidential source information, i.e., information supplied by an informant, in the course of prison disciplinary proceedings. Pet. App. 10a.

Some months after the Court of Appeals affirmed the District Court in Helms' second appeal, 745 F.2d 46 (3d Cir. 1984), Helms filed an application for attorney's fees in the District Court. J. App. 49a, Pet. App. 11a. The District Court denied the application, finding that Helms had lost his claim for damages, that his claim for injunctive relief had been rendered moot by his release from prison in 1980, and that he had neither sought nor benefited

from the issuance of the Bureau of Corrections' amended Administrative Directive 801 in 1984. Pet. App. 27a-39a.

Helms again appealed to the Court of Appeals for the Third Circuit, and that court reversed on the ground that its earlier decision --that Helms' due process rights were violated by the use of information supplied by a confidential informant as the sole basis for conviction of a prison misconduct charge-- was a form of "judicial relief" sufficient to make Helms a prevailing party within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Pet. App. 17a-19a. The court concluded that its statement of the law in its first Helms

opinion, 655 F.2d at 503, was a declaration of rights qualifying as "judicial relief" for purposes of the Fees Act. Pet. App. 18a-19a. The court stated:

> We find that, on the facts before us, the plaintiff did actually obtain judicial relief of the same general type as that requested in his complaint.
> ***
> We find that the district court erred in failing to award attorney's fees for professional services relating to this issue.

Pet. App. 19a-20a. Further, the court held that, if Helms could prove that the amended Bureau of Corrections regulation had been caused by his litigation, he was entitled to prevailing party status on this basis as well. Pet. App. 23a. Accordingly, the Court of Appeals reversed and remanded to the District Court

for further proceedings on Helms' "catalyst argument and for calculation of the fee award." Pet. App. 26a.

Certiorari was granted to consider the question whether Helms was a prevailing party under the Civil Rights Attorney's Fees Awards Act even though his release from prison in 1980 mooted his prayers for equitable relief and petitioners were found to be immune from damages.

SUMMARY OF ARGUMENT

The Court of Appeals held that a civil rights plaintiff who receives no personal benefit from his litigation and who neither seeks nor achieves relief on behalf of a class of litigants nevertheless is entitled to an award of attorney's fees under 42 U.S.C. § 1988. This conclusion is inconsistent with the intent of the Attorney's Fees Awards Act and contrary to the policies underlying the doctrine of good faith immunity for executive branch officals.

A. There can be no doubt that respondent did not receive a personal benefit from this litigation. He sought damages, injunctive relief and a declaratory judgment, all on his behalf alone. Petitioners were found to be immune from damages as a matter of law, respondent received no injunction, and neither the

Court of Appeals nor the District Court directed the entry of a declaratory judgment. What the Court of Appeals found was that it had issued a "declaration" of law in the course of an appeal pursued by Helms before judgment ultimately was awarded in favor of petitioners. This "declaration" was not a declaratory judgment nor could it have been, since by that time respondent had long since been released from incarceration and there was no continuing controversy present. In fact, the court's assessment of the state of the law was made in the course of judging respondent's damages claim; as such, it was merely a prelude to consideration of petitioners' claim of good faith immunity. Thus, the result of this case provided no benefit to respondent nor to a class of plaintiffs on whose behalf he could have sued.

B. If the Court of Appeals is correct, moreover, the important policies behind good faith immunity for public officials is seriously weakened. In the first place, there is nothing in the legislative history to the Fees Act which indicates a congressional intent to alter the well-settled availability of official immunity to petitioners. Thus, to avoid the prospect of substantial fees, public servants would have to pursue litigation despite their entitlement to immunity from damages just to protect against a fees assessment, even where as here the pursuit would have no effect on the relief available on the substantive claims. This result not only dilutes the good faith immunity defense-- which is designed to pretermit unnecessary litigation against public

officials--but is contrary to decisions of this Court holding that responsibility for attorney's fees cannot be divorced from liability on the merits. Helms received no relief from petitioners as a result of his litigation; he should not receive fees for his lack of success.

ARGUMENT

A CIVIL RIGHTS PLAINTIFF WHO RECEIVES NO PERSONAL BENEFIT FROM HIS LITIGATION AND WHO SOUGHT NO RELIEF ON BEHALF OF A CLASS IS NOT A PREVAILING PARTY WITHIN THE MEANING OF THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT.

The Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, authorizes a federal district court to make an award of fees to the "prevailing party" in actions to enforce the Civil Rights Act of 1871, 42 U.S.C. § 1983. The Court of Appeals found that its statement of the law on the use of prisoner informant testimony in institutional discipline settings served "to affirm that the defendants' actions were unconstitutional," Pet. App. 19a, and therefore enabled Helms to claim prevailing party status even though Helms received no

benefit from the litigation and final judgment had been entered against Helms on all claims for relief. This decision is contrary to the intent of the Attorney's Fees Awards Act and inconsistent with the policies underlying good faith immunity.

A. The Attorney's Fees Awards Act Requires That The Plaintiff Or Those Whom He Represents Secure Some Relief In Order To Be Entitled To An Award Of Attorney's Fees

1. The Court of Appeals' decision is not in harmony with the purpose and intent of the Civil Rights Attorney's Fees Award Act. The purpose of the Fees Act is "to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866." 1976 U.S. Code Cong. & Ad. News 5909-10.

While the legislative history of the Act reveals that a party may be considered prevailing "without formally obtaining relief," Maher v. Gagne, 448 U.S. 122, 129 (1980),[3] it is apparent that "some relief on the merits of his claim" must

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[3]To illustrate this point, the legislative history refers to several prior decisions which fall into two general categories--cases in which the plaintiff himself received no benefit but the class on whose behalf he had sued obtained substantial relief and cases in which the plaintiff received relief by settlement, consent decree or a voluntary change in policy by the defendant. See S. Rep. 94-1011, p. 5, citing Kopet v. Esquire Realty Co., 523 F.2d 1005 (2d Cir. 1975) (action conferring benefit upon class); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970)(same); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D.Ore. 1969)(injunction inappropriate for defendants' unintentional violation); Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3d Cir. 1970)(action conferring benefit upon class); Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541

(FOOTNOTE CONTINUED ON NEXT PAGE)

be obtained by the litigant or he may not be considered prevailing. Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (per curiam). In Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), the Court stated that a "typical formulation" is that "plaintiffs may be considered

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FOOTNOTE CONTINUED

(S.D.N.Y. 1975)(class action resulting in consent decree with class relief). See also H.Rep. 94-1558, p. 7, citing Incarcerated Men of Allen County v. Fair, 507 F.2d 281 (6th Cir. 1974) (same); Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976)(settlement of named plaintiff's claims); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S 982 (1972)(action conferring benefit upon class); Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971)(injunctive relief afforded to class); Evers v. Dwyer, 358 U.S. 202 (1958)(test case on behalf of racial minority). Here, respondent pressed no class claims--he sued on his behalf alone--and he received no relief, formal or otherwise. None of the cases mentioned in the legislative history involved a situation in which no party receives any relief.

'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Ibid., quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978). Thus, while the term "prevailing party" has been defined to require a showing by plaintiff of his "entitlement to some relief" and achievement of "some of the benefits the parties sought," the question remains whether a plaintiff is prevailing if the result of the litigation does not actually benefit the plaintiff or anyone whom he represents in the litigation.

The Court's discussion of the legislative history of the term "prevailing party" in Hanrahan v. Hampton, 446 U.S. at 758-59, is instructive.

There, the district court directed verdicts for defendants and plaintiffs appealed. The Court of Appeals reversed and remanded for a new trial, but also awarded the plaintiffs attorney's fees for the appeal under the Fees Act. This Court reversed the award of fees. 446 U.S. at 759. In so doing, the Court noted that an award may be made only to a party who has prevailed. While a "final judgment following a full trial on the merits" is not required, id. at 757, the Court stated that the Hanrahan plaintiffs' success in gaining a new trial did not qualify as a "determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his

own attorney." 446 U.S. at 758. Finding that the plaintiffs had not "prevailed on the merits of any of their claims," the Court considered them to be outside the meaning of "prevailing party" under the Fees Act. Id. at 758-759.

2. a. Under the standard established in Hanrahan, Helms was not a prevailing party. In his complaint, he sought injunctive relief, declaratory relief and damages. J.App. 19a-21a. He received none of this requested relief either from the District Court or voluntarily from petitioners. He received no injunction because his claim was moot by virtue of his release from prison. See Iron Arrow Honor Society v. Heckler, 464 U.S 67, 70 (1983) (per curiam). His claim for damages was rejected because petitioners were found, as a matter of

law, to enjoy good-faith immunity. J.App. 22a-48a. He did not obtain, nor did he even press for, a declaratory judgment.

What respondent did achieve -- if achievement it was -- was a declaration of law on the use of prisoner informant testimony. The Court of Appeals termed this a "declaration [which] is a form of judicial relief." Pet. App. 19a. The problem with this conclusion is that the Court of Appeals never directed entry of a declaratory judgment nor did the District Court ever enter one. In fact, it would have been demonstrably improper to grant Helms a declaratory judgment because, like the claim for injunctive relief, it had been rendered moot.

b. The Court has long held that the federal courts established pursuant to Article III of the Constitution

do not exist to render advisory opinions. Golden v. Zwickler, 394 U.S. 103, 108 (1969). "Concrete legal issues, presented in actual cases, not abstractions," are what is required. Ibid., quoting United Public Workers of America v. Mitchell, 330 U.S. 75, 89 (1947). The mandates of Article III "are not satisfied merely because a party requests a court of the United States to declare its legal rights...." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). The Court "has always required that a litigant have 'standing'" to litigate, ibid., and that such exist at all stages of appellate review, not simply at the time the litigation is commenced. Roe v. Wade, 410 U.S. 113, 125 (1973).

The requirements of actual case or controversy and standing apply to actions brought for a declaratory judgment with the same force as to actions brought for other types of relief. Golden v. Zwickler, supra, 394 U.S. at 108. See also Ellis v. Dyson, 421 U.S. 426, 433 (1975); Steffel v. Thompson, 415 U.S. 452, 460 (1974). The Declaratory Judgment Act itself expressly provides that relief is available only "[i]n a case of actual controversy ...." 28 U.S.C. §2201. The remedy is "designed to permit an adjudication whenever the Court has jurisdiction, there is an actual case or controversy, and an adjudication would serve a useful purpose." 6A J. Moore, Moore's Federal Practice, ¶57-24 (3d ed. 1986). See also Borchard, Declaratory Judgments (2d ed. 1941), p. 299. The "question in each

case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Golden v. Zwickler, 394 U.S. at 108.

By virtue of respondent's release from prison prior to the decision on his first appeal, there was no "continuing controversy" among the parties respecting the claim for declaratory relief. See Perez v. Ledesma, 401 U.S. 82, 102 (1971) (Brennan, J., concurring in part and dissenting in part). This much is illustrated by two decisions of the Court. In Golden v. Zwickler, supra, the Court held that, despite Zwickler's

prior conviction for violating a state ban on distribution of anonymous political literature, his claim for declaratory relief was moot by virtue of his failure to demonstrate the likelihood that he would engage in this activity in the future. 394 U.S. at 109. In so holding, the Court rejected the rationale that Zwickler had a right on his behalf and those who shared his view to a general decision on the constitutionality of the state statute. Id. at 109-110.

Of particular import here is Ashcroft v. Mattis, 431 U.S. 171 (1977) (per curiam). In Ashcroft, the plaintiff sought damages for the death of his son, who had been killed by police while attempting to escape arrest, and a declaratory judgment that statutes authorizing the police action were unconstitutional.

The district court upheld the officers' defense of good faith and denied relief. The plaintiff took no appeal from the denial of damages, but sought review of the denial of declaratory relief. The court of appeals found that declaratory relief was available and remanded for consideration of the constitutional claim. After remand, the district court upheld the statute and the court of appeals reversed. On review, this Court held that there was no present controversy sufficient to justify a declaratory judgment. Ibid. "[T]he District Court was asked the hypothetical question whether the defendants would have been liable apart from their defense of good faith." Ibid. Because the case involved no "present right" of the plaintiff, there was no case or controversy. Id. at 172-73.

The situation is no different here. The Court of Appeals' "declaration" in 1981 had no relation to any "present right" of respondent. Although it preceded the decision on petitioners' immunity from damages,[4] the effect is identical to the declaration in Ashcroft: the litigant gains nothing other than the personal satisfaction that the

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[4]The remand itself resulted in no benefit to Helms. By then he had been paroled from prison and his claim for damages subsequently was rejected as a matter of law. J.App. 22a. The finding of immunity certainly prevents an assessment of fees on the damages claim. Hanrahan, supra, 446 U.S. at 758. Accord Stevens v. Gay, 792 F.2d 1000, 1003 (11th Cir. 1986) (fees cannot be awarded against state officials who successfully assert good-faith defense in §1983 action).

defending officials' conduct was "wrongful." Id. at 172. There simply was no basis in this case for a conclusion that Helms received, or could have received, declaratory relief.

These principles recently have been reaffirmed in Green v. Mansour, No. 84-6270 (December 3, 1985), and City of Los Angeles v. Lyons, 461 U.S. 95 (1983). In Green, class actions were brought for declaratory, injunctive and "notice" relief against state officials for their administration of the federal Aid to Families With Dependent Children Program. While the actions were pending, Congress amended the relevant federal statutes, and the district court then found the cases to be moot and the requested "notice" relief to be barred by the

Eleventh Amendment. This Court affirmed, specifically stating that the propriety of declaratory relief must be "informed by the teachings and experience concerning the functions and extent of federal judicial power," slip op. at 8, and that, absent ongoing violations of law under the revised statutes, a declaratory judgment concerning past violations "would have to stand on its own feet as an appropriate exercise of federal jurisdiction...." Slip op. at 10.

Likewise, in the related context of an action for injunctive relief, past exposure alone to illegal conduct does not present an actual case or controversy "if unaccompanied by any continuing, present adverse effects." Lyons, supra, 461 U.S. at 102. Just as in Lyons, the prospect that respondent here would be subject to a real and immediate

threat of a repeated use of illegal prison informant testimony was, at best, extremely remote by the time of his release from prison in 1980. It had to be "assumed" that, after parole, Helms would "conduct [his] activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners." Id., 461 U.S. at 103. In short, it was simply too speculative in 1981 that a claim for declaratory or injunctive relief would involve a question of "present right."[5] Ashcroft v. Mattis, supra, 431 U.S. at

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[5]As noted above, this case was not brought as a class action; therefore, the question whether unnamed class members could have pursued Helms' claims need not be reached. Cf. Bell v. Wolfish, 441 U.S. 520, 526 n.5 (1979).

172. See also Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 237, 241 (1952).

In reality, what the Court of Appeals decided by its "declaration" was only the first part of a two part inquiry into whether petitioners were liable to Helms in damages. In order to succeed on his claim for damages, Helms was required not only to prove a violation of his rights but he also had to overcome petitioners' asserted defense of immunity. All that the Court of Appeals' declaration accomplished, therefore, was a remand for the District Court to complete the inquiry, the result of which was a finding of immunity which was then affirmed. J.App. 22a. See Hanrahan v. Hampton, supra, 446 U.S. at 758-59.

c. The Court of Appeals here stressed that the Attorneys Fees Act is an endorsement of the "private attorney general" concept which recognizes that some incentive, in the form of attorneys fees, is necessary to encourage private parties to vindicate rights guaranteed by the civil rights statutes. Pet. App. 19a-20a. Of course, it is unquestionable that the fees statute is designed to permit private parties to enforce the civil rights statutes. S. Rep. 94-1011, p. 2-3; H. Rep. 94-1558, p. 1. But we do not understand the Act to use the term "prevailing party" to mean anything other than someone who succeeds on a "claim" which satisfies the case or controversy requirement of Article III. Although a "private attorney general" who succeeds may secure benefits to others by virtue of his personal success,

it hardly makes sense to construe the fees statute to permit recovery whenever a plaintiff's efforts arguably may be of assistance in the future to non-parties. And it would be especially anomalous in the context of this case because decisions of this Court subsequent to the Court of Appeals' statement of the law in 1981 have seriously eroded, if not overruled, that court's "declaration" of rights. See Illinois v. Gates, 462 U.S. 213, 230-31 (1983) (propriety of use of informant testimony to be tested by "totality of circumstances" test); Superintendent, Massachusetts Correctional Institution v. Hill, No. 84-438 (June 17, 1985), Slip op. at 10 (due process is satisfied where there is at least "some evidence" on the record to support a prison disciplinary tribunal's decision).

d. The Court of Appeals' reliance on the issuance of an administrative directive reflecting the Court of Appeals' "declaration" some time after petitioners were found to be immune from damages likewise is infirm. Of course, this change in procedure had no possible impact on respondent since he long since had been released from custody. If this action itself is a basis for fees, the result is counter-productive. Presumably, the petitioners could have avoided fees simply by issuing no directive and, instead, just informally advising prison hearing panels of the Court of Appeals' "declaration." It hardly is a sensible construction of the Fees Act to read it in a way which discourages orderly administration. Cf. Hewitt v. Helms, 459 U.S. at 471 (the "salutary development" of issuing regulations does not by

itself create protectible rights). The illogic of this approach is underscored by the fact that there apparently is no limit to the time period after final judgment during which officials must be vigilant lest their change in policy form the basis for a belated claim for fees.

B. It Is Inconsistent With The Policies Underlying The Doctrine Of Good Faith Immunity To Permit Recovery Of Fees Where The Defense Of Immunity Is Upheld.

Aside from its inconsistency with the fees statute and its legislative history, the Court of Appeals' decision seriously weakens the foundations of good faith immunity. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court held that government officials performing discretionary functions are entitled to immunity from damages, despite

a finding that they had violated a plaintiff's constitutional rights, if the constitutional right was not "clearly established." Id. at 818-819. Good government requires that officials press ahead with their tasks vigorously without fear of liability should a court later decide that their actions were illegal. Id. at 807, 814. By adopting an objective standard to judge immunity claims, the Court was hopeful that the issue of good faith immunity could be decided prior to trial without the need for extensive discovery on the merits. Id. at 818.

If the Court of Appeals is correct, however, the benefits of Harlow to the effective operation of government are severely reduced. In many cases a

court addressing an immunity claim first will address whether the plaintiff has stated a claim and then decide whether the right on which he relies was clearly established.[6] Under the Court of Appeals' formulation, despite a finding of immunity, the plaintiff would be entitled to fees. One need look no further than the recent decision in City of Riverside v. Rivera, No. 85-224 (June 27, 1986) (attorney's fees of $245,456.25 justified where verdict was for $33,350),

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[6]On occasion, courts have assumed without deciding that a plaintiff's complaint states a valid claim and then decided that defendants were entitled to immunity. See, e.g., People of Three Mile Island v. NRC, 747 F.2d 139, 148 (3d Cir. 1984); Knies v. Richardson, Civ. No. 84-C-822 (E.D. Wis., January 14, 1985). Those decisions result in no "declaration" of rights and presumably no attorney's fee award. To have entitlement to fees depend upon which question the court chooses to answer first makes no sense.

to appreciate that the prospect of a substantial award of attorney's fees acts as a deterrent to vigorous exercise of executive discretion every bit as much as the potential for a damages award.

To be sure, nothing prevents Congress from abrogating or altering immunities. But as the Court recognized in rejecting a claim that the civil rights statutes abolished the doctrine of official immunity, there must be a "clear indication" of legislative intent before the Court will presume that Congress intended to alter a common law immunity. Pierson v. Ray, 386 U.S. 547, 554 (1967). See also Wood v. Strickland, 420 U.S. 308 (1975); Scheur v. Rhodes, 416 U.S. 323 (1974). This immunity is available to petitioners by virtue of

their positions as executive branch officials called upon to perform discretionary functions. Scheur v. Rhodes, 416 U.S at 241-42. There is no indication in the legislative history to the Fees Act of a congressional intent to alter the doctrine of official immunity in such a way as to permit the recovery of fees against an official who successfully has asserted immunity on the merits. Indeed, as the Court stated in Hutto v. Finney, 437 U.S. 678, 700 (1978), attorney's fees awards against officials in their individual capacity "were not to be affected by the statute...." If Congress had intended otherwise, it easily could have said so, as it did with regard to States' liability for fees. Hutto v. Finney, 437 U.S. at 700. In the absence of such a statement, there is no reason to abrogate

petitioners' well-settled immunity by imposing a fee award on them under circumstances in which they would be immune from an award of damages.

The Court has expressed some frustration with the substantial litigation which the Fees Act has encouraged. See Hensley v. Eckerhart, 461 U.S. 424, 437, 449-456 (Brennan, J., concurring in part and dissenting in part). The decision of the Court of Appeals here requires defendants to litigate further, despite a finding of immunity, for if a "declaration" of rights remains unreversed they are liable for what may be substantial attorney's fees. This "tail-wagging-the-dog" result, where the prospect of fees fuels litigation which

will have no ultimate effect on the relief awarded, illustrates the unsoundness of the conclusion reached below.

* * * *

"[L]iability on the merits and responsibility for fees go hand in hand...." Kentucky v. Graham, No. 84-849 (June 28, 1985), Slip op. at 5. Section 1988 does not authorize a fee against a party from whom no relief has been obtained; only the party "legally responsible for relief on the merits" is responsible for fees. Ibid. See also Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 418 (1978). It would be demonstrably unfair and out-of-step with the statutory scheme to permit recovery of attorney's fees from a defendant who was not found liable to the plaintiff.

In Hensley v. Eckerhart, 461 U.S. at 436, the Court held that "the most critical factor" in determining a reasonable fee under the Fees Act is "the degree of success obtained." See also Marek v. Chesny, No. 83-1437 (June 27, 1985), Slip op. at 9. If success is "critical" to the reasonableness of a fee already determined to be available, success must be of even greater importance when considering the threshold question of entitlement. The Fees Act should not permit an award in favor of a party who fails to obtain a benefit from his suit. To do so would torture the meaning of "prevailing party."

CONCLUSION

For the above-stated reasons, the decision of the Court of Appeals for the Third Circuit should be reversed with directions to affirm the District Court's denial of respondent's application for attorney's fees.

Respectfully submitted,

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